Supreme Court, U.S.
FILED
JAN 29 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

79-1171

No. ————

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, Minn. 55155
Telephone: (612) 296-2351
Counsel for Petitioner

Of Counsel:
KENNETH E. RASCHKE, JR.
Assistant Attorney
General
102 State Capitol Building
St. Paul, Minn. 55155
Telephone: (612) 296-6480

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

TABLE OF CONTENTS

	Page
Opinions Below	2
Jurisdiction	2
Question Presented	2
The Statute in Question	3
Statement of the Case	4
Reasons for Granting the Writ	9
I. The Majority Decision of the Minnesota Supreme Court is in Conflict With The Equal Protection Standards Established by This Court	9
II. The Principles Involved in This Case Are of Broad Importance Both Within and Outside the State of Minnesota	11
III. The Minnesota Courts Exceeded Their Proper Scope of Review in Resolving Certain Matters of Legislative Fact Contrary to Decisions of This Court	17
Conclusion	19
Appendices	
Appendix A	A-1
Appendix B	A-21
Appendix C	A-34

TABLE OF AUTHORITIES

Page

Cases:

City of New Orleans v. Dukes, 427 U.S. 297 (1976) 9

Katzenbach v. Morgan, 384 U.S. 641 (1966) 9

Parham v. Hughes, 441 U.S. 347 (1979) 11

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949) 9

Vance v. Bradley, 440 U.S. 93 (1979) 9, 17

Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 9, 18

Statutes:

26 U.S.C.A. § 44C (Supp. 1979) 10

28 U.S.C.A. § 1257(3) (1968) 2

42 U.S.C.A. § 5901 (1977) 10, 15

42 U.S.C.A. § 6851 (1977) 10, 15

42 U.S.C.A. § 6881 (1977) 10, 15

IN THE

Supreme Court of the United States

October Term, 1979

No. ————

STATE OF MINNESOTA,

Petitioner,

vs.

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., and M-H PACKAGING SYSTEMS, INC.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

The petitioner, State of Minnesota, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Minnesota which affirmed the declaration of the Minnesota District Court, Second Judicial District, that the State of Minnesota may not, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, prohibit the sale of milk in nonreturnable, nonrefillable plastic containers.

OPINIONS BELOW

The Opinion of the Minnesota Supreme Court issued on September 7, 1979 is not yet reported. The opinion and dissent are set out in Appendix A, *infra*. The Judgment and Order of the State District Court affirmed, in part, by the Minnesota Supreme Court are unpublished and are set out in Appendix B, *infra*.

JURISDICTION

The Opinion of the Minnesota Supreme Court was filed on September 7, 1979. A timely petition for rehearing was denied and judgment entered on October 31, 1979. In this case, the Minnesota Supreme Court, the highest state court in Minnesota, held that Minn. Laws 1977, ch. 268 is repugnant to the Equal Protection Clause of the Fourteenth Amendment, United States Constitution. The jurisdiction of this court is invoked pursuant to 28 U.S.C.A. § 1257(3) (1968).

QUESTION PRESENTED

Is a state statute banning the use of nonreturnable plastic containers for milk sales because of their adverse environmental impact invalid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because it does not prohibit or compel the elimination of another type of milk packaging which may also have an adverse environmental impact?

THE STATUTE IN QUESTION

The 1977 Session of the Minnesota Legislature duly enacted Minn. Laws 1977, ch. 268, codified as Minn. Stat. §§ 116F.21, 116F.22 (hereinafter "the Act"). That act provides:

> Section 1. [116F.21] MILK: PLASTIC CONTAINERS: STATEMENT OF POLICY. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.
>
> Sec. 2. [116F.22] PROHIBITIONS. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.
>
> Sec. 3. This act is effective July 1, 1977.

---

[1] Hereinafter, the term "plastic container" unmodified will refer to the nonreturnable, nonrefillable, rigid or semi-rigid container prohibited by section 2 of Minn. Laws 1977, ch. 268.

[2] Although the Act was effective July 1, 1977, the effective date of the prohibition was delayed for one year by Minn. Laws 1977, ch. 455.

Thus the Act prohibits retail sale in Minnesota of milk in rigid or semi-rigid, throw-away plastic containers as a step in discouraging use of single use containers and encouraging the use of reusable containers. The Act would also permit the use of flexible plastic pouch containers.

STATEMENT OF THE CASE

This action challenging the constitutionality of the Act was commenced on September 29, 1977, in Ramsey County District Court. On November 29, 1977, the State of Minnesota (hereinafter "the State") moved for an order dismissing the complaint. This motion was denied and trial was held from March 15 through March 21, 1978.

The plaintiffs fell generally into two categories: those involved in the production and sale of plastic goods and associated equipment, and those involved in the packaging and sale of milk.

The first group includes:

1. The Society of the Plastics Industry, Inc., a trade association of plastics interests.
2. Phillips Petroleum Company, a multi-national petro-chemical company.
3. Hoover Universal, Inc., a manufacturer of plastic container equipment.
4. M-H Packaging Systems, Inc., a custom molder of plastic containers in Minnesota.

The second group includes:

1. Clover Leaf Creamery Company, a Minnesota dairy.
2. Marigold Foods, Inc., a Minnesota dairy.
3. Wells Dairy, Inc., an Iowa dairy.
4. Weber & Barlow Stores, Inc., a retail grocery company.

At trial substantial evidence was introduced by all parties concerning the history and current status of milk packaging nationally and in the State of Minnesota and in the Province of Ontario, Canada.

For many years, both in Minnesota and nationally, the returnable glass bottle was the predominant container for consumer milk sales (T. 355).[3] Subsequently, a paperboard container, made from woodpulp coated with paraffin initially and later coated with low density polyethylene, gained in popularity. By 1960, the paperboard container predominated (T. 76). In the early 1960's, the nonreturnable, plastic container began to appear as a significant container in the gallon size.[4] Sales in such containers have increased to the present time nation-wide. Presently, plastic containers represent about 30 percent of the national market (T. 76). It is estimated that the plastic container will occupy over half the dairy market in the next ten years, if unchecked (T. 77). The increase in plastic container sales nationally has brought about a corresponding reduction in sales in returnable containers (T. 76).

For reasons of convenience, milk consumers favor nonreturnable containers over containers which have to be returned (T. 78). They consider the plastic container to be more convenient than paper because the paper container is awkward to handle, may leak or break open and will not reseal (T. 78, 357, 450). Returnable plastic containers may have, or could be designed to have similar convenience advantages over paper (T. 357-58).

---

[3] "T" refers to the Trial Transcript.

[4] The asserted interest of respondents and the focus of trial evidence related to the gallon-size container. Unless otherwise qualified, reference in this brief to a particular milk container is intended to refer to the gallon size.

While the plastic container has been a major factor in the national market for a number of years, it is a relatively recent phenomenon in Minnesota (T. 295). Prior to 1977, Marigold Foods, Inc. (which sells the majority of its milk out of Minnesota (T. 458-460)) was the only Minnesota dairy producing plastic containers for milk sales (T. 459).

During 1976, numerous Minnesota dairies began to take steps toward the in-house production of plastic containers for the sale of milk (T. 628). By late 1976, a number of Minnesota dairies had placed tentative orders for machinery to be used in the production of such containers (T. 254, 259-63; Def. Ex. 1).

The plastic container is manufactured by a blow-mold process from plastic resin made from oil or natural gas feedstocks. Machinery for the manufacture of the container costs $220,000 or more for one machine. A 4-head 350 R2 machine produced by Hoover Universal, Inc. is capable of producing approximately 28 containers per minute—a 6-head machine, 42 to 48 per minute (T. 259, 350). Estimates of the cost of in-house production ranged from 5 1/2 cents to 9 1/2 cents per container (T. 301, 353, 432, 435, 450).

There is substantial incentive for a machine purchaser to maximize plastic container production in order to reduce per unit cost (T. 266, 436-37).

The resource and environmental impact of various milk packaging systems was derived from information developed by the Province of Ontario and data compiled by the Midwest Research Institute in a study performed for the United States Environmental Protection Agency and published in a final report of the Agency released August, 1977, entitled: *Resource and Environmental Profile Analysis of Five Milk Container*

Systems (hereinafter "MRI Report") which was introduced in evidence.[5]

While all parties relied on the MRI Report, plaintiffs' reliance was selective. Their evidence at trial centered primarily upon efforts to discredit data in the report indicating that the impacts of the one-way plastic container were more adverse than those of the one-way paper container in the areas of energy use and post-consumer solid waste. While plaintiffs' efforts were directed to environmental and resource comparison of the plastic and paper containers, the evidence plainly demonstrates that both the plastic and paper containers have much higher environmental and resource impacts than alternative returnable and pouch containers.[6] The record also shows that, at the present time the plastic container is produced from oil and natural gas feedstocks (T. 305-06, 313) while the paper container is produced, except for the low density polyethylene coating, from renewable wood resources (T. 40).

The District Court declared that the Act: (1) deprived plaintiffs of substantive due process in violation of the Fourteenth Amendment to the United States Constitution and Minn. Const. Art. I, § 7; (2) deprived plaintiffs of equal protection of the laws guaranteed by the Fourteenth Amendment of the United States Constitution; and (3) constituted an unreasonable burden on interstate commerce contrary to U.S. Const. Art. I, § 8.

On appeal the Minnesota Supreme Court (hereinafter sometimes referred to as the "Minnesota Court") affirmed the district court in declaring the Act void in that it constitutes a

---

[5] Plaintiffs' Exhibit I. Table 2 of that report reflecting the summary data of the various containers studied is reprinted in Appendix C.

[6] See Table Appendix C, *infra*.

denial of equal protection of the laws guaranteed by the Fourteenth Amendment to the United States Constitution. No other state or federal constitutional provision was cited by the Minnesota Supreme Court.

The Minnesota Supreme Court majority's holding is based upon its determination that paper containers (which are not prohibited) are not proved to be environmentally superior to plastic nonrefillables[7] and that the ban on plastic containers will not, in itself, lead to the use of environmentally superior containers. Thus the court concluded that the classification of the Act (i.e., the prohibition of the plastic container without prohibiting the long established paper container) was not rationally related to any legitimate state interest.

The Minnesota Court ignored the State's argument that the legislature, in determining whether to ban both plastic and paper outright, could consider the relative economic and social disruption which would result from a ban on either or both containers. Furthermore, the court did not consider the proposition that the legislature could reasonably act on the knowledge of an impending large scale movement to plastic in major markets and the absence of any indication that any similar movement was pending to increase a commitment to paper packaging.[8]

---

[7] While recognizing that plastic containers consume nonrenewable oil and natural gas, the court indicated that the amount consumed was too small to recognize.

[8] The Minnesota court simply states that this point is illusory absent some evidentiary showing that the legislature will later ban also the paper container.

REASONS FOR GRANTING THE WRIT

I. THE MAJORITY DECISION OF THE MINNESOTA SUPREME COURT IS IN CONFLICT WITH THE EQUAL PROTECTION STANDARDS ESTABLISHED BY THIS COURT.

The majority opinion of the Minnesota Supreme Court declares the Act invalid solely upon federal equal protection grounds. In so holding, however, the Minnesota Court did not follow the standards set forth by this Court in numerous cases. *See, e.g., City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Katzenbach v. Morgan*, 384 U.S. 641 (1966); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

Even assuming, *arguendo*, that the Minnesota Court was correct in its conclusion that the plastic container which is banned is no worse environmentally than the paper container which is not banned, the proper standard under the above-cited cases does not require the simultaneous prohibition of all conduct which may produce the same type of damage. As pointed out in the case of *Railway Express Agency, Inc. v. New York*, 336 U.S. 106 (1949):

> And the fact that New York City sees fit to eliminate from traffic this kind of distraction *but does not touch what may be even greater ones in a different category*, such as the vivid displays on Times Square, is immaterial. *It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.*

Id. at 110 (emphasis added).

More recently in *Vance v. Bradley*, 440 U.S. 93 (1979) this court said:

> The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the political process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Id. at 97 (footnote omitted).

As pointed out by the dissent of Justice Wahl of the Minnesota Supreme Court, adherence to these standards would have compelled the Minnesota Court to uphold the Act as constitutional.

Regardless of the relative position of plastic and paper nonreturnables as environmental villains, it is undisputed that plastic and paper nonreturnables are, environmentally, and in terms of resource conservation, the two worst containers by a wide margin.

The record also shows that the plastic container was a relative newcomer in comparison to paper containers, and at the time the statute was passed the plastic container was just beginning to penetrate major markets in the state.[9] Numerous dairies were on the verge of making substantial capital investments in the plastic system.[10]

Plainly, there is an important government interest in channeling private investment into areas which may result in resource conservation, energy saving or environmental benefit.[11] There is a concomitant interest in deterring investment in processes which are deleterious to the environment and wasteful of natural resources. By deterring capital investment in the plastic container system, the Minnesota legislature may be seen as channeling milk packaging innovation

---

[9] T. 458-60.
[10] T. 628.
[11] *C.f.*, 26 U.S.C.A. § 44C (Supp. 1979), 42 U.S.C.A. §§ 5901, 6851, 6881 (1977).

toward either returnable or pouch containers which would be much superior to either the plastic or paper container in terms of solid waste disposal and energy use.

Therefore, even if the plastic and paper containers are equally disadvantageous environmentally, the prohibition of the plastic container has a rational relationship to the public purpose of guiding dairy packaging practices away from a path which serves only convenience without any environmental or resource benefit.

II. THE PRINCIPLES INVOLVED IN THIS CASE ARE OF BROAD IMPORTANCE BOTH WITHIN AND OUTSIDE THE STATE OF MINNESOTA.

While it is plainly the function of this Court to stand as final guardian against abuses of legislative power, it is also important for the Court to assist in assuring that the legitimate will of the people may be carried out through the actions of their elected legislative bodies where that action does not contravene constitutional safeguards. As this Court noted in *Parham v. Hughes*, 441 U.S. 347 (1979):

> In the absence of invidious discrimination, however, a court is not free under the aegis of the Equal Protection Clause to substitute its judgment for the will of the people of a State as expressed in the laws passed by their popularly elected legislatures.

Id. at 351.

Both the nation and its several states are currently beset with extremely important and complex problems which have no simple solution. Plainly, this is true in the areas of environment and energy usage. While the ultimate solutions to such problems may lie at the national or world levels, it is

vitally important that state governments do what they can to alleviate such problems or to prevent them from becoming more severe or more entrenched. To perform this function effectively, however, it is vital that state legislatures be allowed the full measure of latitude and discretion permitted by the Constitution.

As discussed above, this Court has repeatedly held that the legislature may proceed one step at a time in dealing with difficult and complex problems. Furthermore, in an area of economic regulation not involving fundamental rights, a legislative act must not be struck down merely because a court does not believe it will achieve its full goal or because a court may feel its policies are unwise. It was logical for the Minnesota legislature to conclude that it would be detrimental to the goal of fostering reuseable packaging to permit the Minnesota milk industry to make widespread substantial long-term commitments to a new throw-away system which rivals, if it does not exceed, the existing paper system in resource and environmental detriment. The fact that this nonproliferation concept was indeed pertinent to the legislature's action is demonstrated by the statements of Senators Alan Spear and William Luther on the floor of the Minnesota Senate May 20, 1977.

> Senator Spear: * * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that that is going to involve to begin.

Plaintiff's Exhibit J, Full Senate Floor Discussion, 70th Legislature, May 20, 1977 at 6.

> Senator Luther: * * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.

Id. at 2.

The Minnesota Supreme Court majority, however, determined that federal equal protection does not permit this form of step-by-step approach. The Minnesota Court would instead require that all undesirable packages be eliminated at once or none may be eliminated.

The unwarranted restriction thereby placed upon the legislature is readily apparent. Arguably the legislature could prohibit no act however detrimental so long as any alternative act which produces similar detriment remains unprohibited.

In the context of this case this means that the State must allow the plastic container to become entrenched in the market unless it simultaneously moves to prohibit the long-used paper containers. In other contexts it may mean that a dangerous substance may not be prevented from coming on the market unless all existing harmful alternatives are simultaneously banned.

The ramifications of permitting the decision of the Minnesota Court majority to stand are multifaceted. First, the decision in Minnesota will be asserted as authority in the courts of other states which may attempt any form of packaging or other regulation.

Furthermore, and perhaps more importantly, the rationale set forth by the Minnesota Court may predictably be used to stalemate legitimate legislative action prior to passage. Passage or even serious consideration of a bill is often blocked by an argument that the bill would be unconstitutional. When such an argument is supported by the holding of a state supreme court, the argument becomes extremely persuasive, particularly within the same state. If the decision in this case stands as a legitimate application of constitutional law, it can well be used to block passage of legislative efforts at piecemeal resolution of any problem. The presence of the Society of the Plastics Industry, Inc., a nation-wide trade organization, as a party to this case virtually assures that the Minnesota Court's holding will be brought to bear in any proposal involving plastic packaging throughout the country.

Thus, the danger of this case is not limited to the fact that the Minnesota Court will continue to pursue an erroneous theory of equal protection or that courts of other states may be persuaded to follow the Minnesota Court. A greater danger lies in the likelihood that legitimate legislative efforts will be aborted without any opportunity for judicial scrutiny.

Current environmental and energy problems have brought under scrutiny many hitherto unregulated areas of business. Consumer packaging is one area in which many questions are arising concerning resource conservation and environmental impact. The fact that the U.S. Environmental Protection Agency commissioned the MRI study of milk containers, along with other studies relating to packaging demonstrates the national interest in packaging as an element of solid waste and of resource consumption. Undoubtedly, other states will, in the future, consider various types of packaging regulation

which are based upon the desire to check the growth of solid waste and prevent unnecessary diversion of scarce resources.[12] It is of great importance that states considering such legislative actions have before them authoritative and properly circumscribed standards against which to measure the scope of their authority to guide industry into actions responsive to environmentally responsible and conservation motivated activities.

The Minnesota Legislature perceived a packaging movement in the dairy industry which it saw as directly contrary to a legitimate interest in discouraging the proliferation and further entrenchment of throw-away containers. It determined to block that movement as inimical to policies calling for *reduction* of solid waste, energy usage and reliance upon scarce fossil fuels. Under the standards adopted by the majority of the Minnesota Supreme Court such action is unconstitutional unless the legislature also acts simultaneously to eliminate past problems attributable to the previously established package. Furthermore, no action to prevent unnecessary consumption of oil or natural gas will be upheld unless it will, by itself, result in substantial fuel saving.

---

[12] Recent world events serve to underscore the need to closely question the wisdom of each and every action requiring the use of irreplaceable fossil fuel resources. The President's analogy of our current energy difficulties as the "moral equivalent of war" calls for us to seriously question anything which increases reliance upon nonrenewable oil or natural gas supplies. The strong national policy promoting the urgent search for alternatives to fossil fuels (*see, e.g.*, 42 USC §§ 5901, 6851, 6881 (1977)) indicates that it is *per se* reasonable to discourage practices which are reliant upon fossil fuels in favor of those using renewable resources. If, however, a single piece of legislation which serves that end may be struck down simply because a court sees its effect as a drop in the bucket then each such measure will likewise fail and the country will be denied the potential cumulative benefit of many measures, modest in themselves, but highly significant in the aggregate.

If permitted to stand as a principle of equal protection law in general and a leading case in packaging law in particular, this decision will have a severe chilling effect in Minnesota and elsewhere upon legislative efforts to curb activities which result in the commitment of further capital and resources to policies which value profit and convenience over environmental and conservation concerns.

Thus, the importance of this case goes beyond the issue of whether Minnesota ought to either ban both plastic and paper milk containers simultaneously or ban neither. Rather, the case demonstrates the particular need for this Court to reaffirm for the benefit of the State of Minnesota and other states which may consider similar environmental legislation:

1. That reform may take a step at a time;
2. That a legislative act need not prohibit all evils of a given type at once;
3. That a state in prohibiting deleterious conduct is not compelled by the Constitution to demonstrate that such conduct is, in all respects, the most deleterious of all alternative courses of action;
4. That the status quo is not a constitutional standard against which future efforts at regulation must be judged; and
5. That, absent total irrationality, it is for the legislature to judge the wisdom and perceived effect of a legislative act.

III. THE MINNESOTA COURTS EXCEEDED THEIR PROPER SCOPE OF REVIEW IN RESOLVING CERTAIN MATTERS OF LEGISLATIVE FACT CONTRARY TO DECISIONS OF THIS COURT.

While it is not the intent of the state to belabor factual matters here, if the petition is granted, the state will undertake to demonstrate that in ruling on certain matters of legislative fact upon which the record contains divided or inconclusive evidence,[13] the Minnesota Court exceeded the proper scope of judicial review. As this Court has said in *Vance v. Bradley*, 440 U.S. 93, 111 (1979):

> In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker. *Lindsley v. Natural Carbonic Gas Co., supra*, at 78-79; accord, *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); see *McGinnis v. Royster*, 410 U.S. 263, 274 (1973) (finding that the legislature "could have concluded rationally that" certain facts

---

[13] The Court essentially determined

1. that the plastic containers would not consume more landfill space than paper;
2. that the plastic container consumed no more energy than paper;
3. that the amount of fossil fuels used in making plastic containers is insignificant; and
4. that prohibition of the plastic container would not encourage use of returnable or pouch containers.

were true); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955). As we have said in a slightly different context:

> The District Court's responsibility for making 'findings of fact' certainly does not authorize it to resolve conflicts in the evidence against the legislature's conclusion or even to reject the legislative judgment on the basis that without convincing statistics in the record to support it, the legislative viewpoint constitutes nothing more than what the District Court in this case said was 'pure speculation.' *Fireman v. Chicago, R.I. & P.R. Co.*, 393 U.S., at 138-139.

CONCLUSION

Thus the petition for certiorari should be granted; both to correct the result in this case, itself, and to assure that future legislative decisions will be made with proper constitutional standards in view.

Dated: January, 1980.

Respectfully submitted,

WARREN SPANNAUS
Attorney General
State of Minnesota
RICHARD B. ALLYN
Chief Deputy
Attorney General
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-2351
Counsel for Petitioner

Of Counsel:
KENNETH E. RASCHKE, JR.
Assistant Attorney General
102 State Capitol Building
St. Paul, Minnesota 55155
Telephone: (612) 296-6480

APPENDIX

APPENDIX A
OPINION OF THE MINNESOTA SUPREME COURT
RAMSEY COUNTY

CLOVER LEAF CREAMERY COMPANY, et al.,
Respondents,

vs.

STATE OF MINNESOTA,
Appellant.

Peterson, J.
Dissenting,
Wahl, J.
Endorsed
Filed September 7, 1979
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

Laws 1977, c. 268, which creates a statutory classification whereby plastic nonrefillable milk containers are banned and paper milk containers are preserved, violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, because the classification is not rationally related to a legitimate state interest:

(a) The evidence conclusively demonstrates that in the categories of solid waste management, energy waste, and depletion of natural resources (matters of specific concern

in the Act), the environmental effects of paper milk containers are not less harmful than the environmental effects of plastic nonrefillable milk containers; and

(b) The evidence further establishes that the classification will not promote the Act's stated goal of encouraging the use of refillable milk containers.

Affirmed.

Heard, considered, and decided by the court en banc.

OPINION

PETERSON, Justice.

Defendant, state of Minnesota, appeals from the trial court's judgment in favor of plaintiffs,[1] holding L. 1977, c. 268 (the Act), to be unconstitutional.[2] We affirm the trial court's judgment and hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United

---

[1] Plaintiffs generally may be divided into two categories—those involved in the packaging and sale of milk; those involved in the production and sale of plastic goods and associated equipment.

The first category includes:

1. Clover Leaf Creamery Company.
2. Marigold Foods, Inc.
3. Wells Dairy, Inc.
4. Weber & Barlow Stores, Inc.

The second category includes:

1. The Society of the Plastics Industry, Inc.
2. Phillips Petroleum Company
3. Hoover Universal, Inc., formerly Hoover Ball and Bearing Company
4. M-H Packaging Systems, Inc.

[2] The trial court held L. 1977, c. 268, to be unconstitutional on three grounds:

(1) The act deprives plaintiffs of equal protection of the law in contravention of U. S. Const. Amend. XIV;

(2) The Act deprives plaintiffs of substantive due process of law in contravention of U. S. Const. Amend. XIV and Minn. Const. art. 1, § 7; and

(3) The act constitutes an unreasonable burden upon interstate commerce in contravention of U. S. Const. art. I, § 8.

States Constitution, because it establishes a classification which is not rationally related to a legitimate state interest.

The Act, approved on May 26, 1977, provides:

> "Section 1. The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for packaging milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.[3]
>
> "Sec. 2. Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.391, other than sour cream, cottage cheese and yogurt, in a non-returnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.
>
> "Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense.[4]
>
> "Sec. 3. This act is effective July 1, 1977."[5]

We note three specific aspects of this unique statute:[6] (1)

---

[3] Laws 1977, c. 268, § 1, codified as Minn. St. 116F.21.

[4] Laws 1977, c. 268, § 2, codified as Minn. St. 116F.22.

[5] Laws 1977, c. 455, § 96, superseded L. 1977, c. 268, § 3, and provided, in part: "Notwithstanding any law to the contrary, no prohibition on the retail sale or the offer for retail sale of milk in nonreturnable, nonrefillable plastic containers shall be effective prior to July 1, 1978."

[6] Minnesota is the only state that has legislatively banned nonrefillable plastic milk containers. Ontario, Canada, has banned both plastic and paper nonrefillable milk containers by executive action.

The Act does not, under any circumstances, permit the use of nonrefillable[7] plastic containers for milk;[8] (2) milk is the only commodity affected by the Act, plastic containers are not banned unless they are filled with milk; and (3) only plastic nonrefillable milk containers are affected by the Act, paper nonrefillable milk containers are not affected.[9]

Plaintiffs contend the Act violates the equal protection clause of the Fourteenth Amendment because it creates a classification in which paper containers are to be preserved while plastic nonrefillables are to be banned. Because the present statute involves economic regulation, the relevant test is whether the classification is rationally related to a legitimate state interest. New Orleans v. Dukes, 427 U. S. 297, 96 S. Ct. 2513, 49 L. ed. 2d 511 (1976). Plaintiffs argue that a rational classification is not established because, from an environmental standpoint, paper containers are not superior to plastic nonrefillables, and a ban on plastic nonrefillables will serve to encourage the use of paper containers instead of serving to encourage the use of refillable milk containers.

---

[7] The Act mentions "nonreturnable, nonrefillable containers." A container can be returnable without being refillable. For example, the plastic milk bottle banned by the Act can be returned for recycling, but it cannot be used again to package milk. The term "nonrefillables" is therefore used throughout this opinion to describe milk containers which cannot be used again for the same purpose.

[8] The container referred to is a high density polyethylene plastic container which cannot be returned to the dairy to be refilled with milk for sale to consumers. For the remainder of the opinion, these containers will be referred to as "plastic nonrefillables."

[9] The container referred to is a plastic coated, paperboard container which cannot be returned to the dairy to be refilled with milk for sale to customers. The container is composed of bleached kraft paper coated with low density polyethylene, a plastic related to that used in plastic nonrefillable milk containers. Low density polyethylene comprises about 10 percent of the weight of the container. For the remainder of the opinion, these containers will be referred to as "paper containers."

The Act is intended to further the policies stated in Minn. St. 116F.01; therefore, it is intended to promote the state interests of encouraging the reuse and recycling of materials and reducing the amount and type of material entering the solid waste stream. L. 1977, c. 268, § 1. Specifically, the stated legislative finding of the Act is that nonrefillable milk containers present solid waste management problems, promote energy waste, and deplete natural resources; the stated legislative goal is that use of returnable milk containers should be encouraged. L. 1977, c. 268, § 1. The Act, undoubtedly, deals with legitimate state interests. The crucial question is whether the classification separating paper containers from plastic nonrefillables is reasonably related to these state interests.

We are aware of the deference that is accorded to the legislature when the present type of statute is analyzed on equal protection grounds. Nevertheless, our inquiry into the constitutional propriety of the present classification separating paper containers from plastic nonrefillables is dependent upon facts. Based upon the relevant findings of fact by the trial court, supported by the record, and upon our own independent review of documentary sources, we believe the evidence conclusively demonstrates that the discrimination against plastic nonrefillables is not rationally related to the Act's objectives. Considering only the specific areas of solid waste management, energy waste, and depletion of natural resources, it is clear that the environmental effects of paper containers are not less harmful than the effects of plastic nonrefillables. It is also apparent that the classification will not further the Act's stated goal of encouraging the use of refillable milk containers.

The record supports the trial court's finding that plastic nonrefillables present fewer solid waste management problems than paper containers. The major method of solid waste disposal is by landfill deposit. The evidence at trial established that plastic nonrefillables are superior to paper containers for landfill disposal.

Defendant's expert witnesses agreed that the principal environmental hazards posed by landfill disposal are pollution of underground water, which is caused by leaching, and the creation and escape of methane gas. Both of these environmental hazards are created by waste decomposition. Bacterial and other chemical reactions, combined with percolation of water and other liquids, create leachates which seep into the ground and ultimately into underground water. The same reactions create methane gas, which is both noxious and explosive. Paper milk containers contribute to these environmental hazards because they begin to decompose as soon as the plastic coating on the exterior of the container is punctured or torn. Plastic nonrefillables are essentially inert and therefore do not contribute to the creation of leachates and methane gas.

Maintaining landfill stability is important in landfill disposal for two reasons. First, stability minimizes cracking of the final landfill cover. Such cracking results in the generation of leachates. Second, landfill stability encourages productive use of the landfill site after the landfill project is completed. Because waste decomposition creates landfill instability, plastic nonrefillables contribute to landfill stability while paper containers do not.

The trial court's finding that plastic nonrefillables and paper containers occupy substantially the same amount of landfill space is also justified by the evidence. Plastic non-

refillables contain less raw material and have greater density than paper containers. If total compaction (no void spaces left in containers) is achieved, plastic nonrefillables will occupy less landfill space. The evidence at trial demonstrated that during collection waste is typically compacted to a ıraction of its original volume, that it is compacted further when deposited at the landfill, and that it has continual pressure exerted upon it as other layers of waste are deposited. Under these conditions, there is no basis for asserting that plastic nonrefillables occupy more landfill space than paper containers.[10]

Data in a 1977 final report by Midwest Research Institute (MRI) and the United States Environmental Protection Agency (EPA)[11] supports defendant's argument that plastic nonrefillables take more landfill space than paper containers; however, accuracy of the figures in the MRI report was persuasively attacked by plaintiffs' expert witnesses. Highly significant was the testimony of Richard Welch, a chief investigator involved in the MRI report. Welch indicated that in the first draft of the MRI report it was assumed, based upon con-

---

[10] Plaintiffs provided a relevant demonstration of compaction during the cross-examination of defendant's solid waste expert, Harold Samtur. Counsel for plaintiff crushed samples of both containers with his bare hands. Samtur estimated that the crushed volume of each container was between 10 and 20 percent of its original volume. He further acknowledged that there was virtually no springback of the plastic nonrefillable after it had been crushed and released and that the springback which did occur could be eliminated by squeezing the container between thumb and forefinger.

[11] The report, entitled "Resource and Environmental Profile Analysis of Five Milk Container Systems," was an objective quantification of resource and environmental impacts associated with five milk container systems, including paper containers and plastic nonrefillables, and was the primary source of documentary evidence at trial on the environmental effects of paper containers and plastic nonrefillables. For the remainder of this opinion, the report will be referred to as the "MRI report."

versations with experts, that plastic nonrefillables and paper containers would compress to within 10 percent of their original volume. The American Paper Institute then provided MRI with a study prepared by the Weyerhaeuser Corporation involving the compressibility of milk containers. The test used in the Weyerhaeuser study indicated that paper was superior to plastic. MRI incorporated the Weyerhaeuser finding in its final report because no other written documentation was available. Welch criticized the test conducted by Weyerhaeuser because it neglected to specify the weights of the containers used and because the test was conducted in a laboratory, not under conditions approximating those found in a landfill.[12] William E. Ades of the EPA testified that he too was less confident of compressibility figures in the MRI report than of figures in other categories of container comparison. Welch further testified there was insufficient evidence to conclude that either type of container would consume more landfill space than the other. The contrary conclusion of defendant's solid waste expert, Harold Samtur, was based upon a weak and inconclusive foundation[13] and, as the trial court indicated, lacked convincing quality.

---

[12] In this test, the volume of a container was measured after the container was crushed with a laboratory device and the device was totally released, with no continual pressure exerted upon the container. The evidence at trial indicated waste is compacted to a fraction of its original volume during collection, is compacted even further when deposited at a landfill, and has continual pressure exerted upon it as other layers of waste are deposited.

[13] Harold Samtur relied upon three sources for his conclusion: One, the MRI report. (Samtur accepted the compressibility figures of the MRI report without examining their derivation, in spite of Welch's testimony about their inadequacy.) Two, a 1972 report prepared by a milk packaging working group for the Ministry of the Environment in the Province of Ontario, Canada. (The Ontario researchers estimated the compaction ratio for a refillable plastic milk container and then assumed that the much lighter plastic nonrefillable would consume the same space. The group

Solid waste disposal is also achieved by incineration, a method of disposal in which plastic nonrefillables are superior to paper containers. Although currently not widespread, incineration will become more prevalent as technology advances and the energy value of the heat generated by it can be economically utilized. Both plastic nonrefillables and paper containers burn, but plastic nonrefillables have a much higher Btu value, which results in the recovery of more energy than can be recovered from burning paper containers. Moreover, plastic nonrefillables incinerate completely and do not emit noxious gases into the atmosphere, while paper containers leave residue and emit small amounts of noxious gases.

Recycling is yet another method of solid waste disposal. One of the express purposes of Minn. St. c. 116F is to encourage the reuse and recycling of materials. Plastic nonrefillables are recyclable because they can be ground and used to make a large number of polyethylene products.[14] Paper containers are not recyclable because the paperboard and the plastic coating cannot be separated.

"Source reduction" is a further aid in solid waste management and is similarly an express goal of Minn. St. c. 116F. In the present case, the major relevant source-reduction factor is the constantly declining weight of plastic nonrefillables. Plastic nonrefillables weigh a fraction more than half the

---

also used a nonrefillable plastic milk container incomparable to the container now used in Minnesota, because it was almost 50 percent heavier and was more difficult to crush.) Three, a 1969 study, the "Eggshell Report," on the disposable characteristics of containers. (The study did not include samples of milk containers.)

[14] The evidence indicates that plaintiff Clover Leaf Creamery Company has a voluntary plastic milk container recycling program. Clover Leaf picks up plastic milk containers that are returned to retail stores, grinds them, and sells the plastic material to a salvage dealer.

weight of paper containers and therefore generate less waste. While the unit weight of gallon paper containers has remained at 115 grams or more for at least the past 5 years, improvements in resin, production machinery, and container design have brought about substantial reduction in the weight of plastic nonrefillables.[15] Such a reduction in weight causes a proportional decrease in the amount of raw material used and the amount of waste generated, along with lessened impacts in other environmental categories.[16]

The evidence conclusively demonstrates that plastic nonrefillables present fewer solid waste problems than paper containers.

Similarly, in the category of energy waste, the evidence establishes that paper containers are not superior to plastic nonrefillables. While the figures in the MRI report on energy consumption support defendant's position that less energy is required to produce paper containers, the accuracy of the figures was successfully eroded by plaintiffs. Computed in the MRI report were two values for the amount of energy consumed in the production of paper containers. The higher figure included, while the lower figure excluded, the energy value

---

[15] In 1964, gallon plastic nonrefillables made on blow-molding machines manufactured by plaintiff Hoover Universal, Inc. weighed 100 grams per unit. By 1973, plastic nonrefillables generally used in the dairy industry weighed 70 grams each, the weight used in the MRI report. Blow-molding machines are currently manufactured to mold 60-gram bottles. The average weight used throughout the country, including Minnesota, is currently 65 grams. One Hoover dairy customer presently uses 57-gram containers.

[16] Defendant argues that some reduction will occur under the Act, because use of refillable milk containers will be encouraged. As discussed later in this opinion, the evidence conclusively demonstrates that increased use of refillable milk containers will not be the result of a ban on plastic nonrefillables.

of the wood waste (wood bark and sawdust) generated by the paper manufacturing process. When MRI included the energy value derived from burning wood waste (resulting in a higher figure and a higher level of adverse environmental impact), paper containers were slightly superior to plastic nonrefillables. When MRI did not include the energy value derived from burning wood waste (resulting in a lower figure and a lower level of environmental impact), paper containers were superior. However, MRI's figures for plastic nonrefillables did not take into consideration the effect of the energy value of the waste gases produced in making high density polyethylene. Welch, a chief investigator in the MRI report, testified that a meaningful comparison between plastic nonrefillables and paper containers in the category of energy consumption requires inclusion of wood waste energy in computing the amount of energy consumed in producing paper containers. Welch's testimony was properly credited by the trial court.[17] In its tests, MRI used plastic nonrefillables weighing 70 grams. The average weight of plastic nonrefillables now used in Minnesota is 65 grams. If 65-gram plastic nonrefillables are used and the energy value derived from burning wood waste is included in energy consumption figures for paper containers, the figures demonstrate that production

[17] The evidence at trial indicated that the petroleum industry has, for years, used waste gases to fuel or power various processes. However, it is difficult to pinpoint what amount of energy used in petrochemical processing represents waste energy. The plastics industry generally does not break down the sources of energy used in these processes, because it would be extremely difficult to engage in such an inquiry.

of plastic nonrefillables requires less energy than production of paper containers.[18]

The evidence introduced at trial therefore demonstrates that production of plastic nonrefillables does not require more energy than production of paper containers. The evidence also establishes that the amount of oil and natural gas consumed in the production of high density polyethylene for plastic nonrefillables is negligible and that banning plastic nonrefillables will not increase the volume of natural gas or oil presently marketed for heating or fuel purposes. Thus, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in preventing energy waste.

Furthermore, drawing a distinction between plastic nonrefillables and paper containers is not reasonably related to the state's interest in conserving natural resources. In spite of the fact that timber is considered to be a renewable resource and oil and natural gas are considered to be nonrenewable resources, the evidence demonstrates that banning plastic nonrefillables will not result in lower consumption of natural resources. The amount of crude oil and natural gas used for producing plastic nonrefillables is so small that a ban on plastic nonrefillables will not alter the volume of resources consumed for non-fuel purposes. If any container is likely to have the potential for reducing depletion of natural resources, it is the plastic nonrefillable. The record establishes that the

---

[18] Furthermore, the evidence demonstrates that if the energy value of raw material in each container is excluded or included in determining the amount of energy needed to produce the container, plastic nonrefillables are environmentally superior to paper containers.

Richard Welch, a chief investigator for MRI, concluded that the energy impact of plastic nonrefillables and paper containers is virtually the same.

weight of plastic nonrefillables is continually being reduced and that plastic nonrefillables are recyclable.[19]

The evidence conclusively establishes that the stated goal of the Act, to encourage or promote a return to the use of refillable milk containers, will not be furthered by banning plastic nonrefillables. In 1977, plaintiff Clover Leaf Creamery Company made an effort to revive refillable milk containers in Minnesota and found that consumers would not purchase milk in refillable bottles, even when the only alternatives in some instances were paper containers. Clover Leaf was forced to take back large quantities of milk and finally sold several thousand unused refillable containers at a loss. The rejection of refillable containers occurred even though the cost to retailers was 4 cents less per gallon for returnable containers than for nonrefillable containers and even though thousands of dollars were spent in promoting refillable milk containers. The evidence also indicated that in Ontario, where both plastic nonrefillables and paper containers were administratively banned in 1972, consumers have turned to a third nonrefillable container, the "plastic pouch," as an alternative to refillable containers. Whereas 47 percent of the milk containers used in Ontario in 1971 were refillable, in 1977, the percentage was 19.7.

The evidence demonstrates that convenience is an important factor for consumers and that consumers will therefore

---

[19] When other environmental factors are considered, the superiority of plastic nonrefillables is more evident. For example, the MRI report analyzed factors in addition to energy and compressibility. Using 70-gram plastic nonrefillables, the study demonstrated that production of paper containers (1) consumes more water; (2) generates more water-borne waste; (3) consumes greater quantities of raw materials; and (4) generates more industrial solid waste than plastic nonrefillables. However, the MRI report indicated that paper containers are environmentally superior in the category of atmospheric emissions.

use paper containers instead of refillables if plastic nonrefillables are banned. The environmental effects of producing, using, and disposing of paper containers are not less harmful than the environmental effects associated with plastic nonrefillables.

Defendant argues that even if it is assumed that paper containers are not environmentally superior to plastic nonrefillables, the classification drawn in the Act is rationally related to another legitimate state interest — prohibiting the use of plastic nonrefillables before a significant foothold is acquired in the Minnesota milk market.

Defendant argues that the Act was initiated in response to a move in late 1976 by major Minnesota dairies to a long term commitment to packaging milk in plastic nonrefillables. Defendant reasons that the undoubted consumer convenience of plastic nonrefillables combined with the capital investment in machinery designed to produce plastic nonrefillables and the economic gains to be made by maximizing production would have effectively eliminated any likelihood that the Minnesota dairy industry would later voluntarily turn to refillable containers. Defendant also argues that because nationwide trends indicate plastic nonrefillables dominate in any milk market, it may have been the legislature's concern that if it failed to ban plastic nonrefillables, future regulation against plastic nonrefillables would become too disruptive economically and therefore impossible to achieve. In other words, defendant asserts that the legislature may have believed that if action was not taken to limit the introduction of plastic nonrefillables, they would become immovably entrenched in Minnesota. The evidence indicates, however, that in the early 1970's use of plastic nonrefillables had been established in

many areas of Minnesota, excluding the Twin Cities metropolitan area.

The state interest asserted by defendant is, on this record, speculative and illusory. The gravamen of defendant's argument is that by presently banning plastic nonrefillables, the legislature will, in the future, be better able to promote environmentally sound milk packaging, such as refillable containers. However, the evidence at trial indicates that the Minnesota Pollution Control agency does not presently plan to take or propose further action on the subject of milk containers. Similarly, action by the Minnesota Legislature is uncertain, if not highly doubtful. The original version of the Act included a provision banning paper containers, but that provision was eventually removed from the Act. There is no evidence, therefore, that paper containers will cease to be used in the Minnesota milk market. Because paper containers are not environmentally superior to plastic nonrefillables, any asserted environmental benefit in preventing plastic nonrefillables from being widely used in Minnesota is illusory.

Defendant nevertheless contends that the Act should be upheld as a first step toward solving the overall problem of milk container waste. We do not doubt that legislatures may implement economic programs step by step, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, e. g., Katzenbach v. Morgan, 384 U. S. 641, 86 S. Ct. 1717, 16 L. ed. 2d 828 (1966); Williamson v. Lee Optical Co. 348 U. S. 483, 75 S. Ct. 461, 99 L. ed. 563 (1955). However, such a step must, at the very least, have a rational relationship to achievement of a legitimate state interest. In the present case, the result of the Act, at best, will not be a step toward amelio-

ration of a perceived evil. The evidence is conclusive that paper containers are not environmentally superior to plastic nonrefillables.

We hold that the Act violates the equal protection clause of the Fourteenth Amendment to the United States Constitution because it establishes a classification which is not rationally related to a legitimate state interest.[20]

Affirmed.

WAHL, Justice (dissenting).

While I am persuaded by the evidence cited by the majority which indicates that plastic nonrefillables are no worse, from an environmental standpoint, than paper nonrefillables, I cannot agree that the plastic nonrefillables ban, struck down today, is not "rationally related to a legitimate state interest." I view it as a constitutionally permissible "first step" in a pro-environmental effort on the part of the legislature.

The Court in New Orleans v. Dukes, 427 U. S. 297, 303, 96 S. Ct. 2513, 49 L. ed. 511 (1976), upheld, *per curiam*, the constitutionality of a New Orleans ordinance prohibiting the sale of foodstuffs from pushcarts, except by vendors who had continually operated such a vending business within the French Quarter for 8 years. That classification effectively operated to disqualify all food vendors except two, and there was no reason to believe the two were more likely than any

---

[20] The trial court treated plaintiffs' equal protection and substantive due process attacks as separate questions; but under substantive due process analysis, the means chosen by the challenged legislation similarly must bear a rational relation to the public purpose sought to be served. See, e. g., Federal Distillers, Inc. v. State, 304 Minn. 28, 46, 229 N. W. 2d 144, 158 (1975). The trial court also concluded that the Act constitutes an unreasonable burden on interstate commerce in contravention of art. I, § 8, of the United States Constitution; but because of our decision on equal protection grounds, we do not consider that issue.

others to "preserve the traditions" of the French Quarter, the ordinance's alleged purpose. To the charge that the classification was "a totally arbitrary and irrational method of achieving the city's purpose," the Supreme Court answered:

> "* * * rather than proceeding by the immediate and absolute abolition of all pushcart food vendors, the city could rationally choose initially to eliminate vendors of more recent vintage. This gradual approach to the problem is not constitutionally impermissible." 427 U. S. at 305, 96 S. Ct. at 2517.

The court articulated the role of the judiciary with respect to legislative economic regulations as follows:

> "States are accorded wide latitude in the regulation of their local economies under their police powers, and rational distinctions may be made with substantially less than mathematical exactitude. Legislatures may implement their program step by step, *Katzenbach v. Morgan*, 384 U.S. 641, 86 S. Ct. 1717, 16 L. Ed.2d 828 (1966), in such economic areas, adopting regulations that only partially ameliorate a perceived evil and deferring complete elimination of the evil to future regulations. See, *e.g.*, *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488-489, 75 S.Ct. 461, 464-65, 99 L.Ed. 563 (1955). In short, the judiciary may not sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines, see, *e.g.*, *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423, 72 S.Ct. 405, 407, 96 L.Ed. 469 (1952); in the local economic sphere, it is only the invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth

Amendment. See, *e.g., Ferguson v. Skrupa*, 372 U.S. 726, 732, 83 S.Ct. 1028, 1032, 10 L.Ed. 2d 93 (1963)." 427 U. S. at 303-304, 96 S. Ct. at 2517.

Given such instruction by the highest court in the land, I fail to see how we can distinguish the milk container legislation struck down here from the pushcart vendor prohibition upheld in New Orleans v. Dukes. Regardless of the environmental superiority, found by the majority, of plastic over paper containers, the legislature is free to use a "stepwise" approach, adopting only a partial solution to the waste problem. The legislature could rationally conclude that allowing the plastic nonrefillables to become entrenched in Minnesota would hinder future efforts to force the dairy industry to utilize more environmentally acceptable containers.

The majority concludes that "further action on the subject of milk containers * * * by the Minnesota Legislature is uncertain, if not highly doubtful," citing as evidence the fact that an earlier version of the bill had contained a provision banning paper nonrefillables as well, which provision was eventually removed. However, it is at least arguable that such evidence leads to precisely the opposite conclusion—the same conclusion which might be drawn from the following statements made by senators at the debates on the nonrefillables bill, transcribed and entered in the trial record as Exhibit J:

> "Senator Spear: '* * * It is true that our alternative now is not a returnable system in terms of milk bottles. Hopefully we are eventually going to be able to move to that kind of a system, but we are never going to move to a returnable system so long as we allow another nonreturnable system with all the investment and all of the vested interest that is going to involve to begin.'" Full

Senate Floor Discussion, 70th Legislature, May 20, 1977.

"Senator Luther: '* * * the real direction that we should be headed in the state of Minnesota in terms of packaging, is a returnable system. * * * There will be arguments made here today about how the paperboard container is comparable to the throwaway plastic. That is not the issue that is before us. The issue before us is whether we should go into another throwaway plastic system that will be very, very difficult to convert from.'" Full Senate Floor Discussion, 70th Legislature, May 20, 1977.

The U. S. Supreme Court has frequently observed that a step-by-step approach in economic regulation is permissible, see, e.g., New Orleans v. Dukes, *supra*; Katzenbach v. Morgan, 384 U. S. 641, 86 S. Ct. 1717, 16 L. ed. 2d 828 (1966), and cases cited therein, and has never required actual evidence that a legislature intends to take a further step in the near future in the relevant economic area being regulated. Here, however, it is at least fair to conclude from the legislative history that the Minnesota legislature indeed intended that the bill banning plastic nonrefillables would be a "first step" in the environmental effort. The U. S. Supreme Court's cautions are well taken here; it is not for this court "to judge the wisdom or desirability of legislative determinations" in this area of economic regulation.

The majority opinion, in its discussion of the Ontario experience with a ban on all nonrefillable milk containers, suggests that such a total ban was actually detrimental to environmental efforts, pointing to evidence that the market share of refillables has dropped since the ban was enacted. Trial evidence established, however, that the plastic pouch is clearly

superior from an environmental standpoint to both plastic and paper nonrefillables. Thus, while the measure perhaps did not have precisely the effect intended, it nevertheless had salutary environmental impact. To suggest that such a total ban would not benefit the environment is not only contrary to the evidence; it undermines any attempts on the part of the legislature to proceed with "complete elimination of the evil," an effort of which the plastic nonrefillables was but the first step.

Because I believe that Chapter 268, here declared unconstitutional, was precisely the type of regulation which the U. S. Supreme Court sanctioned in New Orleans v. Dukes, I respectfully dissent from this court's holding that this measure denies equal protection. Having found that Chapter 268 withstands the equal protection challenge, I would further hold that it is not in violation of the commerce clause, Raymond Motor Transportation, Inc. v. Rice, 434 U. S. 429, 440, 98 S. Ct. 787, 793, 54 L. ed. 2d 664, 674 (1978), or the due process clause, Exxon Corp. v. Governor of Maryland, 437 U. S. 117, 124-125, 98 S. Ct. 2207, 2213, 57 L. ed. 2d 91, 99 (1978); Federal Distillers, Inc. v. State, 304 Minn. 28, 38, 229 N. W. 2d 144, 154 (1975), but is a constitutional exercise of legislative powers.

APPENDIX B

CLOVER LEAF CREAMERY COMPANY, PHILLIPS PETROLEUM COMPANY, MARIGOLD FOODS, INC., UNILOY DIVISION OF HOOVER UNIVERSAL, INC., WEBER & BARLOW STORES, INC., THE SOCIETY OF THE PLASTICS INDUSTRY, INC., WELLS DAIRY, INC., AND M-H PACKAGING SYSTEMS, INC.,

Plaintiffs,

vs.

STATE OF MINNESOTA,

Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT OF THE DISTRICT COURT OF RAMSEY COUNTY, SECOND JUDICIAL DISTRICT, STATE OF MINNESOTA (Not published)

This matter was tried by the Court without a jury commencing March 15 and concluding March 21, 1978. Plaintiffs appeared by their attorneys, Leonard J. Keyes, Esq., and Douglas L. Skor, Esq.; defendant, by its attorneys, Byron E. Starns, Esq., Deputy Attorney General and Kenneth E. Raschke, Jr., Esq., Assistant Attorney General.

Upon the evidence adduced at the trial and all of the files and records herein, including the memoranda submitted by counsel, the Court makes the following as

FINDINGS OF FACT

1. The Court has jurisdiction over the parties and the subject matter; a justiciable controversy exists.

2. Plaintiff Clover Leaf Creamery Company ("Clover Leaf"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It owns equipment which

blow-molds plastic milk containers which are not intended to be returned to the retailer for refilling with milk ("nonreturnable, nonrefillable"). It utilizes these containers for marketing of Clover Leaf products, including milk, and also sells them to other dairies for marketing their respective products, including milk.

3. Plaintiff Marigold Foods, Inc. ("Marigold"), a Minnesota corporation, is engaged in the packaging and distribution of milk and milk products within Minnesota and in interstate commerce. It is the lessor of equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for marketing its products, including milk. It has packaged and distributed milk in such containers in Minnesota and elsewhere since 1973.

4. Plaintiff Phillips Petroleum Company ("Phillips"), a Delaware corporation, manufactures polyethylene resin and distributes it in interstate commerce to Minnesota customers, including Clover Leaf. This resin is the material used for the blow-molding of nonreturnable, nonrefillable plastic milk containers.

5. Plaintiff Hoover Ball & Bearing Company has recently changed its corporate name to Hoover Universal, Inc. Plaintiff Uniloy Division of Hoover Universal, Inc. ("Uniloy"), a Michigan corporation, manufactures and sells blow-molding equipment and accessories for the production of nonreturnable, nonrefillable plastic milk containers. It is engaged exclusively in interstate commerce in its Minnesota activities. It has manufactured and sold all of the blow-molding equipment presently utilized in Minnesota for the fabrication of nonreturnable, nonrefillable milk containers.

6. Plaintiff The Society of the Plastics Industry, Inc., ("SPI"), a New York nonprofit corporation, is the principal trade association for the United States plastic industry. It includes in its membership corporation engaged in the production of polyethylene resins, the manufacture and sales of blow-molding equipment and the fabrication of nonreturnable, nonrefillable plastic milk containers. Its members are principally engaged in interstate commerce.

7. Plaintiff Wells Dairy, Inc. ("Wells"), an Iowa corporation, is engaged in the distribution of milk and milk products in interstate commerce in Minnesota and elsewhere. It owns equipment in Iowa which blow-molds nonreturnable, nonrefillable plastic milk containers for such distribution. It has distributed milk in Minnesota in such containers since 1973.

8. Plaintiff M-H Packaging Systems, Inc., ("M-H"), a Minnesota corporation, has a plant in Ramsey County, Minnesota. In that plant it owns equipment which blow-molds nonreturnable, nonrefillable plastic milk containers for sale to dairies in Minnesota and in interstate commerce.

9. Plaintiff Weber & Barlow Stores, Inc., ("Barlow"), a Minnesota corporation, is engaged in the retail grocery business in Rochester, Minnesota and in outlets in Iowa and North Dakota. Among its products for retail sale is milk packaged in nonreturnable, nonrefillable plastic containers.

10. Plaintiff Dennis Johnson, d/b/a Johnson Star Market ("Johnson") has sold his retail grocery business since this action has been filed and is no longer a real party in interest.

11. In 1977, the Minnesota Legislature enacted a criminal statute, Laws of Minnesota 1977, Chapter 268 (coded as Sections 116F.21 and 22, MSA). Chapter 268 provides:

"Section 1. 116F.21) (Milk packaging, statement of policy.) The legislature finds that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products presents a solid waste management problem for the state, promotes energy waste and depletes natural resources. The legislature, therefore, in furtherance of the policies stated in Minnesota Statutes, Section 116F.01, determines that the use of nonreturnable, nonrefillable containers for the packaging of milk and other milk products should be discouraged and that the use of returnable and reusable packaging for these products is preferred and should be encouraged.

Section 2. (116F.22) (Prohibitions) Subdivision 1. No person shall sell at retail or offer for sale at retail in this state any milk or fluid milk product as defined in Minnesota Statutes, Section 32.291, other than sour cream, cottage cheese, and yogurt, in a nonreturnable, nonrefillable rigid or semi-rigid container at least 50 percent of which is plastic.

Subd. 2. A violation of subdivision 1 is a misdemeanor and each day of violation is a separate offense."

Laws of Minnesota 1977, Chapter 455, Section 96, provided that the effective date of Chapter 268 is July 1, 1978.

12. Despite the purported policy statement published by the Legislature as its basis for enacting Chapter 268, the actual basis was to promote the economic interests of certain segments of the local dairy and pulpwood industries at the expense of the economic interests of other segments of the dairy industry and the plastics industry.

13. In enacting Chapter 268, the Legislature's published purpose was to discourage the use of nonreturnable, nonrefill-

able milk containers and encourage the use of returnable milk containers.

14. Chapter 268, if implemented, would not encourage the use of returnable milk containers. It would increase the use of a more expensive and environmentally harmful nonreturnable, nonrefillable paperboard container.

15. In enacting Chapter 268, the Legislature purported to find that the use of nonreturnable, nonrefillable plastic milk containers:

a. Presents a solid waste management problem.

b. Promotes energy waste and depletes natural resources.

16. There is no basis in fact for these findings in the light of Chapter 268's effect of promoting the greater use of paperboard milk containers because:

a. The nonreturnable, nonrefillable plastic milk containers in use today present fewer solid waste management problems than do paperboard containers. Their quantitative contribution to the solid waste stream is miniscule.

b. The plastic milk containers constitute a stable, inert contribution to the landfills. They incinerate almost completely with nonnoxious emissions. They provide approximately 20,000 BTU's of heat during incineration and permit total combustion of other waste products. On the other hand, paperboard milk cartons decay in landfills and contribute to landfill instability, permit see page of leachate into underground water supplies and produce inflammable and explosive methane gas. They provide approximately 7,000 BTU's of heat during combustion

and emit a small amount of noxious gases into the atmosphere.

c. As long as there is petroleum, there will be polyethylene, a petroleum by-product which is used for many purposes in addition to the manufacture of milk containers. Both petroleum and wood are natural resources subject to depletion from innumerable sources, one of the least being milk containers.

17. In enacting Chapter 268, the Legislature purported to rely on a number of policy goals found in Section 116F.01, M.S.A.:

a. To encourage the reduction of the amount and type of materials entering the solid waste stream.

b. To encourage the reuse and recycling of materials.

c. To encourage the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

18. Chapter 268, if implemented, will not succeed in effecting the Legislature's published policy goals because nonreturnable, nonrefillable plastic milk containers will be substantially replaced on the market by nonreturnable, nonrefillable paperboard milk containers. The effects of this replacement on the published goals are:

a. Reduction of the amount and types of materials entering the solid waste system is not encouraged. Gallon paperboard containers weigh almost twice as much as gallon plastic containers and have a greater volume; they occupy substantially the same amount of landfill space after compaction and are coated with polyethylene.

b. Reuse and recycling of materials is not encouraged. Nonreturnable, nonrefillable plastic milk containers are recyclable. Nonreturnable, nonrefillable paperboard milk containers are neither reuseable nor recyclable.

c. Chapter 268 does not address the subject of encouraging the design and implementation of regional programs for materials conservation which take into account the variations in solid waste generation in Minnesota.

19. Chapter 268 does not serve a public purpose.

20. The means chosen by Chapter 268 bear no rational relation to the public purpose purported to be served.

21. Chapter 268 is an unreasonable, arbitrary and capricious interference with the production, marketing and consumption of milk and milk products to the detriment of each of the plaintiffs and many members of plaintiff SPI.

22. Chapter 268 bans only nonreturnable, nonrefillable plastic containers of milk and certain milk products. It does not affect any other milk container or any package of any other substance whatsoever. This classification is unreasonable and arbitrary. It bears no rational relationship to the purported objects of Chapter 268.

23. Despite the purported policy reasons published by the Legislature as bases for enacting Chapter 268, actual bases were to isolate from interstate competition the interests of certain segments of the local dairy and pulpwood industries. The economic welfare of such local interests can be promoted without the remedies prescribed in Chapter 268.

24. The substantial burdens imposed on interstate commerce by Chapter 268 are impermissible. For example, Chapter 268, if implemented, would effectively prevent:

a. Plaintiff Wells and all out of state dairies who market milk in Minnesota in interstate commerce from marketing it in Minnesota in nonreturnable, nonrefillable plastic containers.

b. Plaintiff Clover Leaf from marketing milk interstate in nonreturnable, nonrefillable plastic containers or marketing such containers interstate.

c. Plaintiff M-H from marketing such containers interstate.

d. Plaintiff Uniloy and all other out of state manufacturers and distributors of blow-molding equipment in interstate commerce from selling such equipment in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

e. Plaintiff Phillips and all other out of state suppliers of polyethylene resin in interstate commerce from selling their product in Minnesota for the purpose of fabricating nonreturnable, nonrefillable plastic milk containers.

From the foregoing Findings of Fact, the Court makes the following as

CONCLUSIONS OF LAW

1. Chapter 268 deprives each of the plaintiffs and many members of plaintiff SPI of substantive due process of law in contravention of Amendment XIV to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

2. Chapter 268 deprives each of the plaintiffs and many of the members of plaintiff SPI of the equal protection of the laws guaranteed by Amendment XIV to the United States Constitution.

3. Chapter 268 constitutes an unreasonable burden on interstate commerce conducted by plaintiffs and many members of plaintiff SPI in contravention of Article I, Section 8, United States Constitution.

4. If Chapter 268 becomes effective, each plaintiff and many members of plaintiff SPI will suffer irreparable injury and harm for which none has an adequate remedy at law.

5. Laws of Minnesota, 1977, Chapter 268, is null, void and unenforceable.

6. Defendant State of Minnesota and its agencies, political subdivisions and individuals acting or purporting to act on its behalf are permanently enjoined from implementing or attempting to enforce by civil or criminal action or otherwise the provisions of Laws of Minnesota, 1977, chapter 268.

7. Plaintiffs are entitled to recover from defendant their costs and disbursements.

8. The attached Memorandum shall be deemed to be a part of the Findings of Fact and Conclusions of Law herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: This 5th day of April, 1978.

DAVID E. MARSDEN
Judge of District Court

MEMORANDUM

The standards by which constitutionality of the statute must be determined are well settled.

Chapter 268 is clothed with a presumption of validity and may not be struck down unless its infirmity has been established beyond a reasonable doubt.

Likewise, a Court may not substitute its judgment for that of the legislature as to the wisdom or desirability of the act.

The plaintiffs have satisfied the burden imposed upon them.

No other jurisdiction in the entire country has enacted legislation comparable to Chapter 268.

New York City enacted a city ordinance imposing a tax solely on plastic containers. That gave rise to *Society of Plastics Industry v. New York City*, 3 ERC 1370 (1971) where the trial court, in a comprehensive opinion, held the ordinance unconstitutional.

No controlling appellate decision exist.

The relevant legislative history of Chapter 268 support a conclusion that the real basis for it was to serve certain economic interests (paper, pulpwood, and some dairies) at the expense of other competing economic groups (plastic and certain dairies) by prohibiting the plastic milk bottle.

If, indeed, there were substantial environmental factors favoring the use of the paper milk carton, an entirely different situation would be presented. Such is not the case.

Despite the laudable purposes to which the statute purports to address itself, the evidence overwhelming establishes that the enunciated goals will not be achieved.

The history of the use of returnable bottles, both nationally and locally, is revealing. The trends of public acceptance clearly establish a marked preference for nonreturnable forms of packaging.

The evidence presented in this case requires the conclusion that banning plastic containers will only increase the use of paper containers. Defendant has offered no credible evidence showing that an increased use of returnables would be realized.

Thus, reliance on compared superiority of returnables versus nonreturnables, as it affects the problems of post con-

sumer solid waste, as a means of justifying the statute, is without persuasive effect.

Considerable testimony was presented as to the relative merits of plastic versus paper containers. Certain expert witnesses appeared for the plaintiffs and defendant. Numerous exhibits were received.

The Court, as fact-finder, is obliged to weigh and evaluate this evidence, much of which was in sharp conflict. The opinions of witnesses appearing for the plaintiffs are deemed to be entitled to great weight. They were supported by impartial indepth studies done by the Midwest Research Institute for the United States Environmental Protection Agency.

Defendant's experts, on the other hand, expressed opinions which were not persuasive. The foundation for those views was weak and inconclusive. Indeed, "qualitative" factors were emphasized beyond the "quantitative" factors. They were acknowledged to be more judgmental in nature. The opinions ignored certain relevant factors and placed undue emphasis on other factors, and thus lacked convincing quality.

In *Federal Distillers, Inc. v. State*, 304 Minn. 28, 229 N.W. 2d 144, 157-158 (1975), our Supreme Court set out the substantive process requirements of a statute as follows:

> "(1) That the act serve to promote a public purpose; (2) that it not be an unreasonable, arbitrary or capricious interference; and (3) that the means chosen bear a rational relation to the public purpose sought to be served."

Mere assertions in the preamble of the statute will not save its constitutionality, when as here, its effects are arbitrary and unreasonable. The additional requirements of "rational relation" is likewise absent.

Plaintiffs have established a violation of their constitutionally protected due process rights.

For similar reasons the statute violates equal protection rights which require that affected classifications be reasonable, not arbitrary, and based upon differences having a fair and substantial relation to the object of the legislature.

Reed v. Reed, 404 U.S. 71, 76 (1971)

Plaintiffs have argued as follows:

"The State has singled out the plastic milk container. It has done nothing to reduce or eliminate the use of the other nonreturnable container of the same product which is more environmentally harmful. It has done nothing to regulate the use of containers of other products which pose more immediate problems, such as littering, and which contribute huge volumes to the solid waste stream. It has done nothing about the use of the very same plastic container, by the very same dairies and stores, for fruit juices. It has done nothing about the myriad nonreturnable, nonrefillable plastic containers used to package non-food products. With no rational basis for its action, it has simply deprived the dairy industry and the consumer of the best container ever devised for milk."

I concur.

Finally, the statute impedes the flow of interstate commerce without providing adequate offsetting local benefits. This is especially true as respects the wholesalers and distributors of milk and ultimately the dairy farmers who sell their product to plaintiffs such as Clover Leaf, Marigold and Wells. They are placed in a disadvantaged position in the market. The highly competitive nature of the milk industry must be acknowledged and taken into account.

In *Hunt v. Washington State Apple Advertising Comm'n.*, 432 U.S. 333, 97 S.Ct. 2434, 2446 (1977), the U.S. Supreme Court said

> "When discrimination against commerce of the type we have found is demonstrated, the burden falls on the State to justify it both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives, adequate to preserve the local interests at stake."

Here the "local benefits" have been shown to be a illusory or insubstantial, except for the economic advantages provided the paper and pulpwood industry.

In addition to these claims, plaintiffs have also asserted the statute is so vague, indefinite and ambiguous that its applications and enforcement are left to arbitrary determinations.

In view of the determinations as set forth herein, it is unnecessary to reach or determine the vagueness argument.

D.E.M.

APPENDIX C

TABLE 2

SUMMARY IMPACT DATA FOR 1,000 GALLONS OF MILK DELIVERED
(in one gallon containers by type of container system)

		Milk Container Systems										
		Refillable Containers							Nonrefillable Containers			
		Glass Bottle			Plastic Bottle				Plastic Bottle	Paperboard Carton[a]	Paperboard Carton[b]	Plastic Pouch
Impact category	Units	5-Trip	10-Trip	20-Trip	5-Trip	10-Trip	20-Trip	50-Trip	1-Trip	1-Trip	1-Trip	1-Trip
Raw materials[c]	lb	954.15	480.03	242.97	21.88	14.83	11.31	9.20	17.70	238.88	238.88	2.34
Energy	10^6 Btu	7.42	4.41	2.90	4.98	3.08	2.13	1.56	8.78	6.20	8.62	3.59
Water	10^3 gal.	1.29	0.86	0.64	0.69	0.55	0.48	0.44	0.66	2.87	2.87	0.32
Industrial solid waste	cu ft	2.12	1.10	0.60	0.27	0.18	0.14	0.11	0.38	0.85	0.85	0.13
Atmospheric emissions	lb	32.67	20.93	15.07	19.80	13.70	10.67	8.81	30.86	26.08	26.08	14.02
Waterborne waste	lb	6.26	4.76	4.01	4.08	3.61	3.38	3.32	3.13	6.24	6.24	1.51
Postconsumer solid waste	cu ft	19.92	10.02	5.02	16.24	8.46	5.06	2.00	75.43	30.39	30.39	1.05

Source: Midwest Research Institute.

[a] Total energy without including energy derived from burning wood wastes.

[b] Total energy after including 2.42x 10^6 Btu of energy derived from burning wood wastes.

[c] Hydrocarbon feedstocks are counted as energy rather than pounds of raw materials. Wood fiber, sand, etc., are counted as pounds of raw materials.